STAFF JUDGE ADVOCATE JUNE 1974

THE ARMY LAWYER

DA PAMPHLET 27-50-18 HEADQUARTERS, DEPARTMENT OF THE ARMY, WASHINGTON, D.C.

Compliance by States with the 1949 Geneva Prisoner of War Convention

This article is taken from a recent TJAGSA address delivered by Professor Howard S. Levie of the St. Louis University Law School. It is a revised version of a speech he delivered at the Pakistan Jurists' Conference in Karachi, Pakistan. Professor Levie is a retired Army colonel.

The fact that nation States, big and small, new and old, rich and poor, developed and undeveloped, have, on all too numerous occasions, ignored the rules of war, the law governing international armed conflict, is so well known that I am sure that I need not document it here. The representatives of the 59 countries which met in Diplomatic Conference in Geneva in April 1949, just 25 years ago, to draft, among others, a new prisoner-of-war convention, were fully conversant with the historical problem of noncompliance by States with the law of war, as it was then called—and they took actions which they believed, or at least hoped, would result in future compliance with the provisions of the Prisoner-of-War Convention which they had drafted.[1] Unfortunately, events have proven that they were overly optimistic.

Adherence to the 1949 Geneva Prisoner-of-War Convention, and to the three other humanitarian conventions drafted at the same Diplomatic Conference, has become a sort of status symbol, somewhat similar to membership in the United Nations. I cannot help but feel that many of the newly independent States have adhered to these Conventions with only a very limited perception of the obligations which they were thereby assuming. When Swaziland became bound by these Conventions on December 28, 1973, it was the 135th State to accept the obligation of compliance.[2] What is the obligation for compliance imposed by the 1949 Geneva Prisoner-of-War Convention? How is compliance assured? How is it enforced?

Article 82 of the 1929 Geneva Prisoner-of-War Convention,[3] the direct lineal ancestor of the Convention with which we are here concerned, stated that "the provisions of the present Convention must be respected by the High Contracting Parties under all circumstances." This was, of course, nothing more than a reiteration of the legal maxim *pacta sunt servanda*—treaty obligations must be obeyed. The 1949 Convention made two noteworthy changes in this stipulation. In the first place, the importance attached to this provision by the governmental representatives who constituted the 1949 Diplomatic Conference was demonstrated by their approval of its removal from a position near the end of the 1929 Convention to one of major prominence as the very first article of the 1949 Convention. In the second place, and of even more salience, it now provides not only that the Parties "undertake to respect" the 1949 Convention "under all circumstances" (the sole requirement of the 1929 Convention), but also that they "undertake. . .to ensure respect for" the Convention. Thus, every State Party of the Convention has explicitly accepted the obligation of "ensuring" that every other State Party to the Convention complies with its provisions; and has implicitly accepted the obligation of soliciting and encouraging compliance by any nonparty States which may become involved in international armed conflict.

The potential importance of this new aspect of the article cannot be overstated. The change first appeared in the preliminary work done by the International Committee of the Red Cross (ICRC) during the period between the end of World War II and the convening of the Geneva Diplomatic

The Army Lawyer

TABLE OF CONTENTS

The Judge Advocate General
Major General George S. Prugh
The Assistant Judge Advocate General
Major General Harold E. Parker
Commandant, Judge Advocate General's School
Colonel William S. Fulton, Jr.
Editorial Board
Colonel Darrell L. Peck
Lieutenant Colonel John L. Costello
Editor
Captain Paul F. Hill
Administrative Assistant
Mrs. Helena Daidone

The Army Lawyer is published monthly by The Judge Advocate General's School. By-lined articles represent the opinions of the authors and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army. Manuscripts on topics of interest to military lawyers are invited to: Editor, The Army Lawyer, The Judge Advocate General's School, Charlottesville, Virginia 22901. Manuscripts will be returned only upon specific request. No compensation can be paid to authors for articles published. Funds for printing this publication were approved by Headquarters, Department of the Army, 26 May 1971.

Conference in April 1949. In explaining this proposed addition to the wording of the article, the ICRC said:

> The ICRC believes it necessary to stress that if the system of protection of the Convention is to be effective, the High Contracting Parties cannot confine themselves to implementing the Convention. They must also do everything in their power to ensure that the humanitarian principles on which the Convention is founded shall be universally applied.[4]

It cannot be doubted that the moral, and perhaps other, pressure which could be applied to States engaged in international armed conflict, whether or not Parties to the Convention, by the many States which are Parties thereto and which are not involved in the particular conflict, would be a tremendous force for compliance, a force which would frequently be the determining factor in convincing a belligerent of its obligation to apply the Convention in the international armed conflict in which it is then engaged. Unfortunately, experience since 1949 has demonstrated a strong reluctance on the part of Parties to the Convention to insist, or even to suggest, that other Parties so engaged in international armed conflict have a duty to comply with its provisions. This is particularly true with respect to allies, but it is often true even as to neutral States. During the course of the hostilities in Vietnam some States, such as Sweden, found it possible to condemn the United States and the Republic of Vietnam for alleged violations of the Convention. However, this was probably only because of their inherent animosity to the basic fact that the United States was involved in those hostilities. These same States made no effort whatsoever to seek to obtain compliance with the Convention by the Democratic Republic of Vietnam or by the Viet Cong despite their close relations with these latter two, both of whom had publicly refused to comply with the provisions of the Convention as a matter of official policy.[5] While there were a number of private voices raised concerning India's refusal to comply with the release and repatriation provisions of the Prisoner-of-War Convention during 1972 and 1973,[6] the official voices of States were conspicuous by their silence—or perhaps they were just in so low a key that they could not

be heard, especially by India. And when Syria recently refused to comply with the provisions of the Convention with respect to, among others, notification of the identity of prisoners of war detained by her, no pressure for compliance was brought by either allies or neutrals, at least publicly, and compliance was not obtained as a necessary prelude to the indirect negotiations for disengagement.[7]

Despite the clear and unambiguous provisions of the Convention, many States would very probably consider any efforts to persuade them to comply with its substantive provisions as an illegal interference in the internal or domestic affairs of another sovereign State, even though compliance with the provisions of a multilateral, almost universal, convention concerning the treatment of prisoners of war in international armed conflict would appear to be just about as "external" and "non-domestic" a matter as could be found. Some indication of the attitude of States in this regard is to be found in the recent efforts to update the 1949 Geneva Conventions. Prior to the Second Conference of Government Experts, which opened in Geneva in May 1972, the ICRC prepared a *Draft Protocol* which included the following proposed provision:

> *Article 8. Co-operation of the High Contracting Parties.* 1. The High Contracting Parties being bound, by the terms of Article 1 common to the Conventions, to respect and to ensure respect for these Conventions in all circumstances, are invited to co-operate in the application of these Conventions and of the present Protocol, in particular by making an approach of a humanitarian nature to the Parties to the conflict and by relief actions. Such an approach shall not be deemed to be interference in the conflict.[8]

Obviously, this was intended as an invitation for concerted efforts by neutral Parties to obtain compliance with the provisions of the Convention in any international armed conflict in which they were not being applied. Unfortunately, but perhaps not unexpectedly, the arguments were quickly advanced that this would amount to intervention, that it would violate the duty of respect for national sovereignty, and that it would amount to interference in the domestic affairs of other States.[9] These, mind you, are arguments advanced as reasons why a group of neutral States should not be permitted to act in unison to call to the attention of a State which is engaged in international armed conflict its duty, which it presumably is not performing, to comply with the provisions of a purely humanitarian international convention to which all of the States concerned, neutral and belligerent, are Parties. Predictably, the quoted proposed provision was not included in the *Draft Additional Protocols* which were the working documents for the Diplomatic Conference which met in Geneva earlier this year.[10] It is indeed a sad commentary on our times that shibboleths like "intervention," "national sovereignth," "domestic affairs," etc., should be permitted to be used as an excuse for objecting to a group of States acting together to seek compliance by another State with an international obligation, voluntarily assumed. Unquestionably, there are a number of States which would use these same terms in complaining of approaches by individual States seeking the same objective, despite the fact that Article 1 of the Convention clearly and intentionally contemplates exactly such a procedure.

The undertaking of each Party to the Convention to respect it *under all circumstances*, together with the parallel obligation of all other Parties to the Convention to *ensure respect for* it, results in an obligation which is absolute in character and which is not dependent upon reciprocity. It is in the nature of a statutory obligation owed to *all* other Parties to the Convention, rather than a contractual obligation owed only to a Party's adversary in international armed conflict. The question then arises as to the extent to which a belligerent Party can be expected to continue compliance in the face of manifold violations, or even utter disregard, of the Convention by the other side.

When the United States Senate was determining whether it should give its advice and consent to the ratification of the 1949 Geneva Conventions, the then General Counsel of the United States Department of Defense made a statement which, I believe, could well represent the position of most States which have a tradition of abiding by their international commitments. He said:

> Should war come and our enemy should not comply with the conventions, once we both had ratified—what then would be our course of conduct? The answer to this is that to a considerable extent the United States would probably go on as it had before, for, as I pointed out earlier, the treaties are very largely a restatement of how we act in war anyway.
>
> If our enemy showed by the most flagrant and general disregard for the treaties, that it had in fact thrown off their restraints altogether, it would then rest with us to reconsider what our position might be.[11]

During the armed conflict in Korea the United Nations Command and the United States complied with the provisions of the Convention even though it was not technically in force and despite what amounted not only to almost total disregard of its provisions by the other side, but also to what amounted to almost total disregard of the customary rules applicable in international armed conflict. During the armed conflict in Vietnam the United States complied with the provisions of the Convention despite the denial by the other side that the Convention was even applicable, and despite what again amounted to almost total disregard of the customary rules applicable in international armed conflict. Whether the United States, or any other Party to the Convention, will long continue to comply with its provisions in the face of total disregard of those provisions, or outright refusal to apply them, by the other side in a future international armed conflict remains to be seen. Certainly, should another such adversary adopt a similar attitude, it can be assumed that the United States might well do what it has said it would do—"reconsider what [its] position might be"—if for no other reason than to bring pressure to bear to obtain proper treatment for members of its armed forces held as prisoners of war, treatment which they did not receive in either of the two international armed conflicts mentioned.

Commentators generally appear to agree that few States can actually be expected to continue to apply the provisions of the Convention in the absence of reciprocity despite the specific provision to that effect which is a part of the Convention. The validity of their conclusion has recently been demonstrated by events in the Middle East. As I have already mentioned, Syria refused to furnish the names of the Israeli prisoners of war held by her, or to allow the ICRC to visit them. Israel, which had furnished the names of the Syrian prisoners of war held by her, then refused to allow the ICRC to visit them. As usual, the problem began to escalate and finally, on January 21, 1974, the ICRC sent an appeal to all 135 of the States which are Parties to the Convention in which it stated, in part, as follows:

> . . .The competent authorities all too often make reciprocity a condition for the application, totally or in part, of the Geneva Conventions. This is equivalent, in prevailing circumstances, to the exercise of reprisals.
>
> . . .The ICRC emphasizes that commitments under the Geneva Conventions are absolute, and that States, each one to all others, bind themselves, solemnly and unilaterally, to observe in all circumstances, even without any reciprocal action by other States, the rules and principles which they have recognized as vital.[12]

At first glance, from a humanitarian point of view, insistence on reciprocity appears to be an extremely unfortunate procedure to follow as it means that where one side fails to comply with the provisions of the Convention *all* prisoners of war held by both sides will be denied its benefits and safeguards. On the other hand, if a State can only ensure that the members of its own armed forces held as prisoners of war by the enemy will receive the humanitarian treatment contemplated by the Convention by affording such treatment to the enemy prisoners of war whom it holds in custody, this may, in the end, prove more humanitarian than unilateral compliance as it may well result in all prisoners of war held by both sides receiving Convention treatment. This outcome will, of course, depend upon many factors, not the least of which will be the general national attitude of a State towards compliance with its international commitments; and, of perhaps even more importance, its concern for the well-being of its own captured personnel. This concern for the welfare of the personnel of its own armed forces who have had the misfortune to become prisoners of war

will, for many States, be the determining factor affecting a number of policy decisions. This was evidenced by the actions of the United States during the hostilities in Vietnam. This is what makes it so extremely difficult to understand the attitude taken by the Soviet Union in 1941–1942 when Germany, which held many, many more Russians as prisoners of war than the Soviet Union held Germans, was willing, on a strictly reciprocal basis, to take some small steps to ease the hardships of the captives. The strenuous efforts of the ICRC to effectuate that willingness collapsed because of what can only be described as a complete lack of interest on the part of the Soviet Union.[13] The miseries and deaths of literally hundreds of thousands of Russian prisoners of war can be attributed, at least in some part, to that decision of the Soviet Government.

What, then, is the outlook for compliance by States with the humanitarian provisions of the 1949 Prisoner-of-War Convention in any future international armed conflict? As a pragmatist, I fear that I cannot be very optimistic and suggest to you either that there will not be future international armed conflicts, or that there will be full compliance with the provisions of the Convention. Experience since 1949 clearly demonstrates that all too many States will very frequently act in this area in the manner which they themselves determine to be in their own national self-interest. If they consider it to be in their own national self-interest to comply with the law of international armed conflict, including the humanitarian provisions of the 1949 Convention, they will do so. If they do not consider it to be in their own national self-interest to comply with the law of international armed conflict, including the humanitarian provisions of the 1949 Convention, they will not do so. Regrettably, it is necessary to conclude that we live in an era in which there is much talk of humanitarianism and of "compliance with the rule of law" but in which there is far less actual State compliance with international obligations than there was at the turn of the century. We must each in our own way do what we can to raise the level of international morality. We must aim for that point at which international moral compulsion will be so strong that States will accept the fact that they have no alternative but to comply generally with the humanitarian laws of international armed conflict, including those relating to prisoners of war.

Footnotes

1. 75 U.N.T.S. 135; 6 U.S.T. 3316; D/A Pam. 27–1, Treaties Governing Land Warfare 67 (1956).
2. 13 Int'l Rev. of the Red Cross 456 (1973).
3. 118 L.N.T.S. 343, 391; 47 Stat. 2021, 2059; TM 27–251, Treaties Governing Land Warfare 65, 111 (1944).
4. Draft Revised or New Conventions for the Protection of War Victims 5 (1948).
5. See Levie, *Maltreatment of Prisoners of War in Vietnam*, 48 B.U.L. REV. 323, 328–330 (1968).
6. See, for example, Levie, *Legal Aspects of the Continued Detention of the Pakistani Prisoners of War by India*, 67 AM. J. INT'L. L. 512 (1973); and Zillman, *Prisoners in the Bangladesh War: Humanitarian Concerns and Political Demands*, 8 INT'L LAW. 124, 134–135 (1974).
7. See Blaustein and Paust, *On POW's and War Crimes*, 120 CONG. REC. E370 (daily ed., Jan 31, 1974).
8. I Basic Texts submitted by the International Committee of the Red Cross to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 7 (1972).
9. I Report of the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 185 (1972).
10. Draft Additional Protocols to the Geneva Conventions of August 12, 1949 (1973).
11. Testimony of Wilber M. Brucker, *Hearings on the Geneva Conventions for the Protection of War Victims before the Senate Committee on Foreign Relations*, 84th Cong., 1st Sess. 11 (1955)
12. 14 Int'l Rev. of the Red Cross 75–76 (1974).
13. I Report of the International Committee of the Red Cross on its Activities during the Second World War 408–425 (1948).

Release of MP Accident Reports

An interim change to Army Regulations 340-17, Release of Information and Records from Army Files, 25 June 1973, returns certain release authority to SJA's concerning requests for Part B, Military Police Traffic Accident Report, DA Form 3946. Pending publication of a change to the regulation, the subparagraphs below are changed as follows:

Paragraph 2–7a(4)—The Provost Marshal General is authorized to act on requests for release of information contained in military police re-

ports except for DA Forms 3975 (Military Police Report); and 3946 (Military Police Traffic Accident Investigation Report); see subparagraph (9) below.

Paragraph 2–7a(9)—The Judge Advocate General is authorized to act on all other requests including requests for information from DA Forms 3975 (Military Police Report) and 3946 (Military Police Traffic Accident Investigation Report). He is also authorized to act on requests within the purview of (1) thru (8) above, in cases involving litigation on which the United States has an interest.

The interim change, dated 27 February 1974, adds that: "Guidance contained in 68–5 Judge Advocate Legal Service (JALS) 23 referencing release authority for Part B of DA Form 3946 remains applicable. Authority to release DA Form 3975 MP report (under guidelines of the aforementioned delegation in 68–5 JALS 23), is hereby delegated to the SJA of each General Court-Martial jurisdiction."

Updated to reflect references to current regulations, 68–5 JALS 23 provides essentially that such release will include language to the effect that any opinion or conclusion expressed therein is not necessarily that of the Army. In any case in which an injured party's attorney is representing the United States in a claim for the reasonable value of medical services furnished by or at the expense of the Army under Army Regulation 27–40, Chapter 5, Section II (June 1973), he should be advised before release is made. The Litigation Division, OTJAG, will be advised of the release in those instances in which litigation against the Government may arise. Paragraph 2–5*a*. Army Regulation 340–17, *supra*, controls in the event of present or pending litigation.

In those instances wherein Part B, Military Police Traffic Accident Report is not released, the request should be forwarded to The Judge Advocate General in accordance with paragraph 2–7*a*(9), AR 340–17, *supra* for his action as the initial denial authority.

The Army Takes Care of Its Own

The commendable disaster relief and claims efforts of the Fort Rucker JAGC office not only deserve recognition—there is a lesson for the entire Corps to be learned from this experience.

Shortly before dusk on 30 December 1973, disaster struck the family housing area of Fort Rucker, Alabama, in the form of a tornado which destroyed 14 sets of family quarters, damaged 96 other sets of family quarters and ultimately generated over 60 claims. Miraculously, no one was seriously injured, although there were initial reports of a young boy pedaling through the sky on his bicycle. Fortunately, that rumor proved unfounded.

That night was spent assembling a claims task force, preparing claims packets and planning for the major effort which would be required for this holiday emergency.

The following morning, New Year's Eve 1973, all available victims were briefed by the Commanding General and selected members of his staff, including the Staff Judge Advocate. Following this briefing a claims and legal assistance desk was opened in the disaster relief center near the damage site. At the same time authority was obtained from the Army Claims Service, Ft. Meade, Maryland, to make advance claims payments. In addition, field claims attorneys, accompanied by photographers, secured photo coverage of the most severely damaged areas. This was vital to insure preservation of evidence for substantiation of claims, particularly those against commercial insurers, since additional severe weather was impending and it was necessary to remove household goods from the unserviceable quarters to prevent further damage. Affected commercial insurers were notified of the damage and its known extent; liaison between the insurers and the SJA operation was then instituted.

On New Year's Day 1974, the claims task force provided personal assistance and insurance liaison in the disaster relief center and in the affected housing area. At the same time, the entire Staff Judge Advocate section was reorganized to focus

the maximum possible personnel assets on the claims effort. It was determined that essential military justice work and emergency legal assistance would be performed with a skeleton crew of two judge advocates and one clerk. This crew was also charged with screening all other demands on the section outside the claims field (*e.g.*, administrative law matters) and deferring or resolving them as required. In addition, our civil service procurement law specialist was allocated to work with the Procurement Division of the Directorate of Industrial Operations to help handle the extraordinary procurement requirements occasioned by the disaster. The remainder of the section was used to augment the claims division and to organize field claims teams.

Early on 2 January 1974, the Army Claims Service delegated authority to the Staff Judge Advocate to expend the statutory maximum ($10,000.00) in final settlement of any claim submitted as a result of the tornado, and to approve the statutory maximum ($5,000.00) for advance payments. This was done on their initiative, which gave us a tremendous morale boost.

Also on 2 January 1974, an extensive telephone survey of 550 potential victims was undertaken to discover the probable extent of damage to personal property. During the six days of the survey, over 2,000 calls were made by four persons calling for six to eight hours per day. As a result, 410 potential claimants were contacted by telephone. At the same time, field claims teams began a week-long effort to personally contact each family which had been relocated, suffered serious quarters damage, or could not be reached by telephone, with primary emphasis on those who had suffered the most damage. By the end of the first day, 18 of the families which had been hit the hardest had been contacted and assisted in the preparation of their claims. All told, 119 actual or potential victims were personally contacted and assisted. A total of 529 potential claimants were contacted as a result of these efforts.

The first disaster payments were made on the third day following the tornado, 2 January 1974. One advance payment of $1,000 was applied for and paid and two final claims were submitted and paid on that date.

Normal claims procedure involved an interview by appointment with the claimant. In anticipation of the increased workload and the urgency of tornado claims, the appointments then on the books were deferred until further notice. This allowed the claims operation to provide same-day settlement service to all tornado victims except for a very few cases in which appraisals or repair estimates for unusual items caused unavoidable delay. Although normal claims service was given second priority, 61 ordinary claims were received and processed during this period of maximum effort on behalf of the tornado victims.

Lessons Learned.

We learned several lessons which might be of value to other judge advocates faced with similar situations:

First, we found that we were unprepared for such an emergency in the sense that planning and organizing had to be conducted simultaneously with operations; we had not prepared *and rehearsed* adequate contingency plans. As a result, action has been initiated to include an SJA representative in the Emergency Operations Center when activated for natural disasters, as least initially. A Claims and Legal Assistance Element consisting of a Claims and Legal Assistance Officer, a Claims Examiner, and a Clerk-Typist (augmented as required) is to be established in the Forward Command Post which will be activated in future emergencies. Field Claims Teams, consisting of one Judge Advocate and one Legal Clerk each, are to be incorporated into the on-call resources included in the Base Disaster Plan.

Second, immediate action was required and taken on 31 December 1973 to remove personal property in the most heavily damaged area to storage for protection from the elements. This action had the potential for precluding or increasing the difficulty of recovery by the owners from commercial insurers and making settlement of claims against the government more difficult. The Field Claims Teams mentioned above were organized (including all available photographers) to inspect and photograph damaged goods on site. Where movement was by commercial carrier, the required carrier's inventory was primarily relied

on and priority of photographic coverage was shifted. In other cases, (*i.e.*, those in which the families themselves or military units moved the goods) priority of photographic coverage was to owners having commercial insurance. Identified commercial insurers were notified of these arrangements and concurred.

These measures, taken to preserve evidence of damage to personal property, were sufficient to overcome later problems with claims and insurance settlements which would otherwise have arisen. As a result, Field Claims Teams are to be augmented with photographers for similar efforts in future operations and commercial movers are to be used to the maximum feasible extent.

Third, early priority on 31 December 1973 was placed on notification of commercial insurance carriers and the Army Claims Service. This resulted in immediate delegation of authority from the Army Claims Service to make advanced claims payments and in excellent response by commercial insurers. Continued liaison resulted in complete delegation of claims authority and a set-aside of funds by the Army Claims Service and thorough coordination of effort with commercial insurers. Similar liaison will be established early and maintained continuously in future operations.

Fourth, as soon as measures for preservation of evidence and direct contact with the most seriously damaged families were accomplished, the on-the-ground and telephone survey mentioned previously was conducted to determine who had suffered property damage and what commercial insurance was involved. Although many manhours and over 2000 telephone calls were required, the resulting information was invaluable for planning and in speeding claims settlements. An additional, but intangible, result was the feeling expressed by many of those contacted that "Fort Rucker takes care of its own." The results of such a survey justify the considerable manpower required. Similar surveys will be integrated into future operations.

Keys to Success.

The keys to the success of this operation were threefold: integration, motivation and people-orientation. Our efforts were thoroughly integrated with those of the other agencies involved. For instance, had we not known immediately of the plan to evacuate household goods, vital evidence could not have been preserved. The Information Officer supplies the necessary photographers. All SJA personnel involved were quickly put in contact with victims and acquainted with the site of the disaster. This insured the most important factor, an appreciation of and a determination to solve the urgent problems of the victims.

The result was the conviction on the part of several hundred Army people that "The Army Takes Care of Its Own (especially at Fort Rucker)."

JAG School Notes

1. School Publications Delayed. You may have thought that the School had discontinued its publications. In the March issue of *The Army Lawyer*, we advised that a paper shortage was delaying Volumes 62 (Fall 1973) and 63 (Winter 1973) of the *Military Law Review*, but that *The Army Lawyer* and *Judge Advocate Legal Service* could be expected on schedule. Then you did not see *The Army Lawyer's* April and May issue until late June. Our excuse is that the printer holding the Government contract went out of business entirely.

The uncompleted portion of the *Military Law Review* contract was awarded to the Williams Printing Company of Richmond, Virginia, which is proceeding apace with Volumes 62 and 63 (we took time to update some footnotes) and soon will have the manuscript for Volume 64 (Spring 1974). Meanwhile, the Government Printing Office could find no bidder on the ArLaw/JALS contract and undertook to contract ArLaw out on a single issue basis with GPO retaining the address plates and making distribution. You should have received a copy of the April issue of *The Army Lawyer* during the third week of June and the May issue shortly thereafter. We are aware of some errors in quantity, however, and are attempting to straighten that out with GPO.

Now a contractor has been found for *The Army Lawyer* and JALS: McDonald and Eudy Printing, Temple Hills, Maryland. It may take an issue or two to get back on schedule with *The Army Lawyer* so that you receive it early in the month. During the uncertainty outlined above, we withheld manuscript for a JALS and plan that the 74–4 issue will be a "catch-up" issue with the cases you have already seen in the advance sheets being merely headnoted rather than digested. The patience of our readers is appreciated. We do not see any indicators of future business failures, but a paper shortage (see DA Cir 340–18, 8 Apr 74) could affect us at any time.

2. Review of Publications. Unrelated to the problems recounted above are two other matters concerning our publications. First, we are reexamining the content and format of *The Army Lawyer* with a view to making it more effective and useful to you. Is each of the regular features useful? Should some be expanded or added? Second, TJAG has asked us to reevaluate the need for JALS. Are the advance sheets, *U.S. Law Week*, the *Criminal Law Reporter* and the *Military Law Reporter* so widely and rapidly disseminated that JALS is no longer needed? We may have to inflict questionnaires upon you to obtain accurate data. If so, please help by responding promptly. In any event, we'd be happy to have your spontaneous views as to these questions.

3. Visiting Professor. The School is engaged in a last-minute search for a Visiting Professor for the Academic Year beginning in August 1974. Since August 1973 we have benefited significantly from the work of Lieutenant Colonel Frank Elliott, JAGC, USAR, who now must return to his teaching at the University of Texas School of Law. (Lieutenant Colonel Elliott has been selected to command the 1st JAG Detachment and also will be relinquishing his mobilization designation assignment to TJAGSA.) Lieutenant Colonel Chapin Clark, Professor of Law at the University of Oregon, had been selected as TJAGSA's Visiting Professor for the coming year. However, Oregon also selected him as its Dean and he understandably must remain there to assume his new duties. As with Professor Elliott and Dean Clark, we are looking each year for an outstanding civilian law teacher, with at least five years' experience, who holds an active (*i.e.*, not Standby or Retired) reserve status, and who would like to spend a year on active duty on the TJAGSA Faculty. Nominations from the field are welcome.

4. New Building Progress. With the annual Judge Advocate General's Conference scheduled for the period 6–10 October 1974, a frequently-asked question is whether we will be in our new home. The answer, unfortunately, is no. The general contractor, McDevitt and Street of Charlotte, North Carolina, tells us that it will probably be December before the building is ready for occupancy. This year's conference, like its recent predecessors, will use the facilities of the UVA School of Continuing Education. We plan, however, to conduct tours of the new building for the conferees.

5. School Personnel and Organizational Changes. Personnel changes by name are regularly reported elsewhere in *The Army Lawyer*. It is of interest, however, that TJAGSA has lost seven faculty members this year (six from the same division: Administrative and Civil Law). Of those who left active service, four are now teaching at other law schools; namely, Case Western Reserve, Arizona State, Oregon and San Diego.

The School has redesignated three of its teaching divisions as follows: Administrative and Civil Law (formerly Civil Law), International Law (formerly International and Comparative Law) and Command and Management (formerly Military Operations, Management and Plans). The changes in title do not signal a change in instructional emphasis, although the Command and Management Division is assuming increased responsibilities in the training of both Basic and Advanced Courses, as well as the Management Courses and administration of the Senior Officers Legal Orientation (SOLO) Course.

A reduction in authorized spaces has eliminated the School's Professional Liaison Officer and Race Relations/Equal Opportunity Officer (and clerk) as separate positions. Nevertheless, the School will continue, within its existing resources, to perform its responsibilities for managing the Corps' relationships with legal professional organizations and for race relations training of its students, staff and faculty.

6. Reserve Affairs Changes. Lieutenant Colonel Keith A. Wagner, Assistant Commandant for Reserve Affairs since June 1971, will leave in August to become the SJA, U.S. Army Base Command, Okinawa. His key position as officer in charge of the Corps' reserve component programs will be filled by Lieutenant Colonel James N. McCune who has been Chief of the Training Office in the Reserve Affairs Department. Captain Eldon D. Roberts, Chief of Reserve Component Career Management will be leaving, too (to attend the 23d Advanced Course). As of this writing, these two critical positions (Training and Career Management) are available to be filled by well-qualified officers dedicated, as their predecessors, to maintaining the attractiveness and effectiveness of reserve service in the JAGC.

7. USAR Training. The summer of 1974 has brought Reserve Component judge advocates to Charlottesville in greater numbers than ever before. In June, 105 Claims teams and Legal Assistance teams of the Judge Advocate General's Service Organization underwent annual training here. For the 120 officers, specialized claims and legal assistance instruction and practical exercises were presented by the Administrative and Civil Law Division. The 225 enlisted members of the teams received legal clerks and clerk-typist instruction, according to their MOS, under the sponsorship of the 1034th USAR School of Concord, New Hampshire.

Graduation exercises for the JAGSO Detachments on Friday, 14 June, were marked by the first "streak" at TJAGSA. Two unclad males transited the auditorium at a swift trot. TJAGSA personnel have been unable to identify the participants.

In July, TJAGSA for the first time is the site of the annual training phase of the USAR School Branch Officer Advanced Course. Approximately 50 reserve judge advocates will receive two weeks' instruction in military and criminal law from a combination of TJAGSA and USAR School faculty members. Simultaneously, another 17 Reserve Component JA's will attend the resident phase of JA Reserve Component General Staff Course. Host USAR School for the training of both groups is the 2093d of South Charleston, West Virginia.

8. Audio Cassette Tapes. For those who missed the First Management for Military Lawyers Course, a pilot demonstration audio tape cassette featuring the condensed remarks of Mr. Howard Hayden is available for distribution to JA's in the field. Prepared by Nonresident Instruction, in conjunction with TJAGSA's audio-visual group, the cassette represents our first effort towards providing interesting and informative taped CLE programs for the individual military attorney. The tape is a standard 90-minute audio cassette, and may be requested for loan from the Deputy Director for Nonresident Instruction, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901. Two more presentations are presently under way in the area of consumer protection and financial planning for the serviceman. Look for more word on our video and audio cassette work in future issues of *The Army Lawyer.*

9. Book Department. The JAG School Bookstore—which will come under control of the Army and Air Force Exchange Service on or before 31 December—stocks copies of two recent books on military law. *Justice Under Fire: A Study of Military Law* by Joseph W. Bishop, Jr. ($6.54) and *Swords and Scales: The Development of the Uniform Code of Military Justice* by William T. Genrous, Jr. ($11.42) can be obtained by writing or telephoning the Bookstore. Also available are Homer Moyer's *Justice in the Military* ($21.00, soft cover) and the *Military Law Reporter* ($45.00 annual subscription) both published by the Public Law Education Institute. The Bookstore also carries an embroidered JAGC blazer patch ($10.25). The prices mentioned above do not include the postage and handling fee; usually about 50 cents. We have been informed that the popular JAGC rhinestone pin for ladies is no longer manufactured by our former source of supply in Germany. Unless alternative arrangements can be made, they will no longer be available.

Judiciary Notes

From: U.S. Army Judiciary

1. Administrative Notes.

a. *Report on Military Personnel Convicted of Civilian Felonies.* Staff Judge Advocates of commands concerned are reminded that the report (RCS DD–M (SA) 1061), for the period 1 January–30 June 1974, on the number of military personnel convicted of felonies in U.S. Federal and State Courts, is due by 5 August 1974. See HQDA letter, dated 4 June 1973, Subject: Statistical Report of Criminal Activity and Disciplinary Infractions in the Armed Forces. The reporting requirement is primarily applicable to Army Forces Readiness Command; Army Pacific (as to Hawaii); Army Forces Command; Army Training and Doctrine Command; Army Materiel Command; Army Health Services Command; Army Communications Command; Army Security Agency; Army Intelligence Command; Army Air Defense Command; Army Recruiting Command; Army Criminal Investigations Command; Army Alaska; Army Forces Management and Terminal Service; Military Academy; Military District of Washington; and Chief of Engineers. The reports should be mailed to HQDA (JAAJ-CC), Nassif Building, Falls Church, Virginia 22041.

b. *JAG-2 Quarterly Reports.* Staff Judge Advocates of commands having general court-martial jurisdiction should forward (via air mail) the JAG-2 Report for the period of 1 April –30 June 1974 not later than 11 July 1974, to HQDA (JAAJ-CC), Nassif Building, Falls Church, Virginia 22041. Attention is invited to the guidance set forth in DA message 272047Z March 1974.

2. Recurring Errors and Irregularities.

April 1974 Corrections by ACOMR of Initial Promulgating Orders:

(1) Showing incorrectly that a Charge was alleged as a violation of Article 123 rather than Article 123a—two cases.

(2) Failing to show in the name line the correct service number—four cases.

(3) Failing to show that certain specifications were formally amended during trial—two cases.

(4) Failing to show in the FINDINGS paragraph that a certain charge and its specification had been dismissed—two cases.

(5) Failing to show verbatim the specification upon which the accused had been arraigned —three cases.

(6) Failing to show verbatim the accused's plea as to a charge and its specification.

(7) Failing to show verbatim the findings as to a charge and its specification.

(8) Failing to show that a plea to a charge and specification was changed from "Guilty" to "Not Guilty" and, then, changed to "Guilty with exceptions and substitutions."

(9) Failing to show the correct number of previous convictions considered by the court-martial—two cases.

(10) Failing to show that the sentence was adjudged by a Military Judge.

(11) Failing to show the correct date for the ACTION.

3. Note from Government Appellate Division*

The reverberations of *United States* v. *Burton*,[1] are still being felt through the military justice system and the military appeals courts continue to add refinements and clarifications to that ruling. Considerable attention is presently being given to the determination of what delays in bringing a case to trial are attributable to the Government and defense, and whether the arraignment of an accused at an initial Article 39(a) session within 90 days tolls the counting period for purposes of

*Prepared by CPT Gary F. Thorne, JAGC, Government Appellate Division, USALSA.

Burton when the subsequent proceedings are held beyond 90 days.

The Article 39(a) session is part of the trial.[2] The term "Article 39(a) session" was specifically used to avoid confusion with the term "pretrial session" as used by federal courts.[3] Such a session may be convened "at any time after the service of charges which have been referred for trial" where the presence of court members is unnecessary.[4] While this session was meant to incorporate into the military system the pretrial sessions used by federal courts under Rule 12 of the Federal Rules of Criminal Procedure,[5] this is not the sole purpose of Article 39(a) since such sessions are part of the trial.[6] However, it seems apparent that if *Burton* is to have substance, the prosecution will not be allowed to arraign an accused at an Article 39(a) session for the sole purpose of tolling the counting of 90 days.[7]

Importantly, the reference to such action by the prosecution in *United States* v. *Mitchell*,[8] spoke to situations where the *only* purpose of the initial Article 39(a) session is to toll the 90 day counting period. Under such conditions, a defense counsel can properly move to dismiss the charges for lack of a speedy trial under *Burton*, despite the arraignment within 90 days, where the total period of confinement prior to the beginning of the trial on the merits exceeds 90 days.

The difficult cases will involve Article 39(a) arraignments that are more than mere "tolling sessions," but which are nevertheless followed by delays that bring the total confinement period to over 90 days. While the direction the appeals courts will take in this area is murky at best, there are some initial guidelines both trial counsel and defense counsel can follow for the present period.

If the initial Article 39(a) session is one of substance, such as where motions are raised and even witnesses presented on the motions, the Government has been found to have fulfilled its obligation in bringing an accused to trial, even though there was a subsequent delay following this session that boosted the confinement period to over 90 days.[9] The Court of Military Review decision in *United States* v. *Griffin* was a short form, so the basis of the speedy trial ruling must be speculative. In that case, appellate defense counsel argued that the Article 39(a) session did not toll the counting period and that to allow the Government to do so would leave *Burton* meaningless. Apparently, the court considered the prosecutor's readiness to proceed with the trial on the merits at the time of the Article 39(a) session as a vital factor. The 14 day delay between the initial Article 39(a) session and the next trial date did not result from trial counsel's unpreparedness, but was set by the military judge to give him time to consider motions and for the counsel to file briefs on those motions if they so desired. Such an initial Article 39(a) session will toll the counting period under *Burton*, for the prosecution has met its burden of acting to dispose of the charges within 90 days.[10] Trial counsel seems to have a viable argument that whenever an initial Article 39(a) session is held within 90 days of an accused's original confinement, and that session is one at which he is prepared to proceed to a final disposition of the charges, any subsequent delay based on matters arising out of that session or necessitated by a full docket should not be counted in the 90 days that brings into play the application of *Burton*. Defense counsel's obvious task is to ascertain whether or not the trial counsel is really prepared to proceed to a final disposition of the charges or is prepared only to handle certain motions and is hoping a subsequent delay will result during which time he can complete his trial preparation. The military judge must then decide if the Article 39(a) session, even though substantive in nature, still constitutes an attempt by the prosecution to avert the burden under *Burton* while gaining additional preparation time.

The simplest means of tolling the 90 day rule through an Article 39(a) session is a mutual agreement on counsel's part as to a subsequent delay. Such a delay, when clearly agreed to on the record,[11] is a defense delay.[12]

Another related problem involves delays due to crowded dockets or the unavailability of a military judge. In *United States* v. *Slaughter*[13] the accused was in pretrial confinement for 92 days prior to an Article 39(a) session.[14] While the post-Article 39(a) session delay appeared moot,[15] the two judge majority stated that a 14 day delay between the initial Article 39(a) session and the trial on the

merits, resulting from a crowded docket, would not be held against the accused. The court *did* count this time against the Government as part of the confinement counting period, but under the circumstances of the case, ruled that that time fell within the extraordinary circumstances cited by *United States* v. *Marshall* and justified the delay of over 90 days.[16] Importantly, Slaughter was tried in Korea and the court took "judicial notice of the fact that only one GCM judge is located in Korea, with the only other GCM judges in the Pacific being in Okinawa and Hawaii."[17] This factor resulted in delays due to heavy dockets and limited transportation facilities and met the extraordinary circumstances test.

The facts of *Slaughter* are vital since the Court of Military Review has previously stated that case backlogs resulting from delays caused by "personnel shortages, injuries, illnesses and absences are not sufficient justification for delays beyond three months."[18] *Slaughter* is further limited to its facts by the Court of Military Appeals' decision in *United States* v. *Reitz*.[19] There a trial date was set for 88 days after accused's initial confinement. Two days before that trial date, trial counsel notified defense counsel that the military judge was unavailable and that the new trial date would be July 28, 95 days into the confinement. The Court of Military Appeals ruled that such a forced delay was not one consented to by defense counsel and was not a delay attributable to the accused.[20] Since *Reitz* was governed by *United States* v. *Marshall*,[21] it is clear that the Court of Military Appeals held this delay, caused by a military judge's unavailability, against the Government. Further, the court found no extraordinary circumstances to justify the delay.

The apparent distinction between *Reitz* and *Slaughter* is that in *Reitz* the trial counsel failed to place in the record the reason for the military judge's unavailability, while in *Slaughter* the court took judicial notice of the underlying circumstances of the unavailability and found that it constituted an extraordinary circumstance.[22] The lesson for trial counsel is to protect himself on the record, which will require more than a chronology of events.[23]

Finally, even a guilty plea accepted at an initial Article 39(a) session may not toll the 90 day counting period. In *United States* v. *Marell*,[24] the accused pleaded quilty to two of five specifications. This plea came at an Article 39(a) session held within 90 days of his initial confinement, but the trial on the merits was twice delayed due to a convening authority appointing an entirely new court membership and the unavailability of a military judge on emergency leave. When the trial on the merits day arrived, confinement exceeded 90 days and the defense counsel moved for a dismissal based on *Burton*. The motion was denied and trial held, but the accused was found not guilty of the remaining charges. The accused was thus found guilty only on those charges he had originally pleaded to. Despite this fact, the Court of Military Review found that those pleas did not toll the confinement period applicable to *Burton*. For this reason the Court of Military Review reversed the trial court decision and dismissed the charges for lack of a speedy trial.

These decisions give both the trial counsel and defense counsel directives in proceeding at trial. Trial counsel must place on the record any agreement with the defense to a delay or that time will probably count against the Government in any speedy trial appeal. Trial counsel should recognize that they tread on shaky ground when attempting to justify a delay due to the nonavailability of a military judge or a crowded docket. The defense counsel can argue that under *United States* v. *Reitz* such time is part of the confinement period and such reasons do not constitute extraordinary circumstances justifying a delay when the confinement period exceeds 90 days.

The trial counsel can rely on *United States* v. *Slaughter*, stating that that court specifically considered *Reitz*, but still concluded that such matters as crowded dockets over which neither side has any control will count as part of the confinement time, but are nevertheless extraordinary circumstances justifying a delay exceeding 90 days.

Most important for both sides is a documentation on the record of all facts and circum-

stances resulting in a delay that exceeds 90 days. *Burton* recognized that each case has its own merits for consideration when delays are involved, and subsequent cases indicate that where those merits are on the record, they will be carefully weighed. What the Court of Military Appeals obviously desired in *Burton* was for the Government to begin in earnest a trial within 90 days of confinement. What constitutes an earnest attempt to finally dispose of charges will be the subject of appeals for some time to come.

4. Note from Defense Appellate Division.

Continuing Developments in the Military Law of Speedy Trial. Ever since the full force and effect of the speedy trial guidelines promulgated in *United States v. Burton*, 21 USCMA 112, 44 CMR 166 (1971) were enunciated by the Court of Military Appeals in *United States v. Marshall*, 22 USCMA 431, 47 CMR 409 (1973), the military appellate courts have been wrestling with the problems of when the *Burton* rule is triggered and whether defense-created delay excepts a particular case from the *Burton* rule. The following are recent cases which trial defense counsel should utilize in urging that the *Burton* presumption applies to their cases.

No Army case has yet squarely presented the issue of whether the government may avoid the *Burton* rule by simply releasing an individual from pretrial confinement on or shortly before day 89. However, the Navy Court of Military Review in *United States v. Cahandig*, 47 USCMA 933 (NCMR 1973) opined that the *Burton* rule applied under the circumstances of that case where pretrial confinement covered 89 days and there were eight more days of restriction. Also, several recent decisions have indicated that holding an Article 39(a) session does not toll the time accountable to the government. In *United States v. Marell*, CM 430318 (ACMR 18 April 1974), the *Burton* presumption was utilized in dismissing charges where there was an Article 39(a) session before 90 days but the trial on the merits did not occur until the accused was released from pretrial confinement after 95 days. *See also United States v. Mitchell*, CM 429740 (ACMR 29 January 1974).

The Military appellate courts have seized upon defense requested delays in pretrial processing which thereby deprives the appellant of the benefits of the *Burton* presumption. *See* "Speedy Trial: Burton and Its Aftermath." *The Advocate*, Vol. 5 No. 3 (July-October 1973). Recent cases have settled some fact situations in favor of the defense. Reliance upon the statutory waiting period from the service of charges until trial cannot be considered defense delay. *United States v. Parker*, CM 429805 (28 December 1973). The mere submission of a request for discharge in lieu of court-martial is not defense created delay. *United States v. O'Brien*, 22 USCMA 557, 48 CMR 42 (1973); *United States v. Parker, supra.* However, a specific request to delay trial pending decision on a Chapter 10 has meant the loss on one occasion of the *Burton* presumption. *United States v. Cook*, CM 429795 (3 October 1973). Trial defense counsel should not request, without careful consideration, and the concurrence of their clients, a delay in trial because of a Chapter 10 application particularly since the regulation itself does not preclude a convening authority from approving both the court-martial findings and the administrative discharge. *See United States v. Jones*, CM 427375 (29 January 1973).

Similarly, other delays requested by defense counsel in pretrial proceedings or pertaining to inception of the trial itself, should only be those needed to further that particular client's interest. The heavy workload of a defense counsel should not operate to the prejudice of any single accused. It should be remembered that the right to a speedy trial is a right belonging to an accused, not his defense counsel. If defense counsel need additionaly time to handle an accused's case because of other commitments, that reason should be given, and documented, with the Article 32 officer or trial counsel who press for immediate action. Recognizing the reality and practicalities of a defense counsel's multifaceted workload the defense was not charged with a one-week delay in the Article 32 Investigation in *United States v. Driver*, CM 429661 (ACMR 4 January 1974). On this point the Court of Military Appeals in a decision finding prejudicial error in conducting a Article 32 Investigation without the presence of retained civilian counsel noted:

A commitment to try a general court-martial case that has been ordered to trial by the judge was, in our opinion, an eminently reasonable, not a censurable, ground for postponement of the Article 32 hearing, and counsel should not be charged with causing that delay. *United States v. Maness*, 23 USCMA 41, 48 CMR 512 (1974)

It is the professional responsibility of an attorney to decide whether he can assume the burdens of a case without prejudice to previous commitments and other clients. *See* EC 2–30, 2–31, Code of Professional Responsibility and Standard 1.2, Standards Relating to the Defense Function, made applicable to lawyers in court-martial proceedings by paragraph 2–32, AR 27–10. Defense counsel saddled with conflicting court or pretrial hearing dates, in an appropriate case, should request that the convening authority or his authorized representative relieve him from those commitments he cannot meet because of these conflicts.

Further, defense counsel should not concur in changes in trial dates proposed by the trial counsel as that has been treated as a request for a delay, *See, United States v. O'Neal*, 48 CMR 89 (ACMR 1973).

The change in speedy trial law prompted by *United States v. Burton, supra*, is still reverberating throughout the military justice system. Trial defense counsel should continue to press for a strict interpretation of the Court of Military Appeal's mandate and resist government attempts to carve out exceptions.

Footnotes

1. 21 USCMA 112, 44 CMR 166 (1971) [hereinafter cited as *Burton*].
2. Paragraph 39*b*(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV.).
3. ANALYSIS OF CONTENTS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, REV. ED., Headquarters, Department of the Army, July 1970, DA Pam. 27–2, p. 9–1 [hereinafter cited as ANALYSIS].
4. 10 U.S.C. § 839 (1970) (Article 39, Uniform Code of Military Justice).
5. 1968 U.S. Code Cong. & Admin. News 4510–4511 (Senate Report).
6. ANALYSIS, *supra* note 3, at 9–1.
7. United States v. Mitchell, No. 429740, ____ CMR____ (ACMR 29 January 1974).
8. *Id.*
9. United States v. Griffin. No. 430520 (ACMR 8 April 1974).
10. Burton, *supra* note 1, at 117, 44 CMR at 171. While the counting period for the 90 day rule of *Burton* may be tolled by such action, counsel should remember this does not necessarily mean that the speedy trial mandate of Article 10 of the Code has been met. *See* United States v. Hounshell 7 USCMA 3, 21 CMR 129 (1956). It should also be noted that United States v. Griffin may be a case where the counsel expressly agreed to the delay. The military judge, on the record stated:

    > Gentlemen, prior to making any ruling at all on this motion, I would want to do some research. Considering the hour and the fact that under any circumstances we would have to reconvene, I would suggest that we reconvene at 0900 hours on the 29th of June (two weeks later). At that time I will hear arguments on your motion, and I will make my ruling at that time. If counsel for either side desires to submit any brief on this issue, citing legal authorities, I would appreciate it if you would do so prior to the court's reconvening. Is that satisfactory with counsel?

    There was no objection by either counsel.
11. United States v. Reitz, 22 USCMA 584, 585-586, 48 CMR 178, 179-180 (1974).
12. United States v. Driver, No. 429661 (ACMR 4 January 1974), *pet. granted*, 30 April 1974. *See* United States v. O'Neal, 48 CMR 89 (ACMR 1973).
13. United States v. Slaughter, No. 429715, ____ CMR ____ (ACMR 29 March 1974) [hereinafter cited as Slaughter].
14. *Id.* (At dissenting opinion of O'Donnell).
15. The issue of mootness, as raised in the dissenting opinion, resulted from the Government's concession at trial that a 92 day delay existed even subtracting the 14 day delay following the initial Article 39(a) session.
16. 22 USCMA 431, 47 CMR 409 (1973).
17. United States v. Slaughter, No. 42915, ____CMR ____ (ACMR, 29 March 1974).
18. United States v. O'Neal, 48 CMR 89-93 (ACMR 1973). The distinction takes on added significance when one notes that the O'Neal and Slaughter decisions were written by the same judge.
19. 22 USCMA 584, 48 CMR 170 (1974).
20. *Id.* at 593, 48 CMR at 179.
21. *Id.*
22. If this is a distinction in fact, it raises a new bundle of questions as to what reasons for the unavailability of a military judge, trial counsel or defense counsel will constitute extraordinary circumstances in applying Burton through United States v. Marshall.
23. *See* United States v. Kaffenberger, 22 USCMA 478, 47 CMR 646 (1973). Indeed any chronology which merely reflects when events took place without explaining why it took that long is of no value in sustaining the Government's burden.
24. No. 430318 (ACMR 18 April 1974).

Litigation Notes

From: Litigation Division, OTJAG

Military Personnel and Bail. The recent publicity concerning former Lieutenant William Calley's release on bail by a Federal judge has stirred renewed interest in the subject of whether military personnel are entitled to bail. At the same time that Calley was making the news, however, the fact that Federal judges in Hawaii, Kansas, and Maryland were denying bail to military pretrial and post-trial prisoners escaped the media's attention. In Maryland, for example, U.S. District Judge Young refused bail to the soldier who was in pretrial confinement at Fort Meade on charges stemming from his landing a helicopter on the White House lawn. That case was briefed and argued before the Court by Captain Peter Desler of the Litigation Division, OTJAG. Mr. George Beall, the United States Attorney for Maryland, commended Captain Desler for his outstanding work on the case in a letter to The Judge Advocate General.

The Government's arguments and authorities in military bail cases are excellently summarized in the "Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss or, in the Alternative, For Summary Judgment," prepared by Captain Donald Shelton while a member of the Litigation Division, OTJAG, for a case before the U.S. District Court for Hawaii. That portion of the memorandum dealing with bail reads:

MEMBERS OF THE MILITARY AWAITING TRIAL BY COURT-MARTIAL ARE NOT ENTITLED TO BAIL; THE EIGHTH AMENDMENT IS INAPPOSITE

The Eighth Amendment to the Constitution provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The bail provision of this Amendment applies to civilians. The Eighth Amendment is not applicable to military personnel and bail is wholly unknown to the military law and practice. *United States ex rel Watkins v. Vissering*, 184 F. Supp. 529 (D.C. Va. 1960); Weiner, "Courts Martial and the Bill of Rights" 72 HARV. LAW REV. 266, 284, 285; 29 TEMPLE LAW QUARTERLY 1, 5; *United States ex rel Woodard v. Deahl*, 60 F. Supp. 666 (W.D. Ark.); *United States v. Bayhand*, 6 USCMA 762, 21 CMR 84 (1956); 64 COLUMBIA LAW REVIEW 127 (1964). Bail is not even indexed in Colonel Winthrop's learned treatise on military law. *Winthrop Military Law and Precedents* (2nd Ed. 1896).

Historically, military personnel have never enjoyed full freedom of speech, the right to bail, or trial by petit jury. *Welchel* v. *McDonald*, 340 U.S. 122 (1950). The requirement of bail is inappropriate in the military where the individual has no freedom of movement, but rather is at all times subject to control by his superiors. See, *Henderson, Courts-Martial and the Constitution.* 71 HARV. LAW REV. 293, 315 (1957); quoted in Weiner, "Courts Martial and the Bill of Rights, *supra* at p. 286.

Congress has never enacted legislation authorizing bail for members of the military. The current Military Code (10 USC 801 *et seq.*) has no provision for bail. This omission was deliberate. The unavailability of bail to the military was fully discussed in committee hearings which proceeded enactment of the Uniform Code of Military Justice. See *Hearings from Sub-Committee of the Committee on Armed Services; House of Representatives on H.R. 2498, 81st Congress, 1st Session, pages 99, 921, 922.* Further, Congress specifically excluded courts-martial from the provisions of the Bail Reform Act (18 U.S.C. §3146, *et seq.*). In 1965 the House of Representatives and the Senate developed parallel bills on bail reform, H.R. 10105 and S. 1357. The Senate bill excluded all military tribunals and the House bill did not. The Attorney General of the United States brought this difference to the attention of the House Judiciary Committee. In 1966 the House accepted the Senate version and the bill was enacted with the express provision for the exclusion of all military tribunals. (See *Senate Report*

750, 16 Sept 1965 and House Report No. 1541, 18 May 1966).

Article 1, Section 8, Clause 14 of the United States Constitution provides that Congress shall have the power:

> ". . .to make Rules for the Government and Regulations of the land and naval Forces."

Pursuant to this grant, the Congress has consistently authorized pretrial confinement for those facing trial by court martial, without recourse to bail. Article XLI of the Articles of War in effect in 1775, provided:

> "To the end that offenders may be brought to justice; whenever any officer or soldier shall commit a crime deserving punishment, he shall, by his commanding officer, if an officer, be put in arrest; *if a non-commissioned officer or soldier be imprisoned till he shall be either tried by court-martial, or shall be lawfully discharged* by proper authority." (Emphasis supplied) (*United States* v. *Bayhand,* 21 CMR at page 87)

Similarly, the current code provisions which were enacted in 1950 do not provide for bail in the military:

> "Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, *as circumstances may require; . . .*(if charged with a minor offense) he shall ordinarily not be placed in confinement. (10 U.S.C. §810)

> ". . .[N]o person while being held for trial . . . may be subjected to punishment or penalty other than arrest or confinement . . . nor shall the arrest or confinement . . . be any more rigorous *than the circumstances require to insure his presence at trial . . .*" (Emphasis supplied) (10 USC §813).

Concerning the failure of these provisions to provide for bail, the Supreme Court has repeatedly recognized the Congress' constitutional power to make rules for the government and regulation of the land and naval forces bears no limitation as to offenses, and cannot be diminished or expanded by the Supreme Court. See *Kinsella* v. *United States ex rel. Singleton,* 80 S.Ct. 297, 361 U.S. 234, 4 L.Ed2d 268 (1960). At an early date the Supreme Court stated that:

> ". . .[T]he power of Congress in the government of the land and naval forces, and the militia, is not at all affected by the fifth or any other amendment." (*Ex parte Milligan,* 71 U.S. (4 Wall.(2 (1866)).

And in *Ex Parte Reed,* 100 U.S. 13, 21 (1879), the Court stated:

> "The constitutionality of the acts of Congress touching army and navy courts-martial in this country, if there could ever be any doubt about it, is no longer open to question in this court."

In *Dynes* v. *Hoover,* 61 U.S. (20 How) 65, 79 (1857), the Supreme Court stated:

> "Congress' authority to provide for the trial and punishment under Article I was given without connection between it and the third Article of the Constitution defining the judicial power of the United States."

The most emphatic recognition given the primacy of Federal statutes regulating confinement and punishment in the military was stated by the high court in these words:

> ". . .[T]o those in the military or naval service of the United States, the military law is due process." *United States ex rel. Creary* v. *Weeks,* 259 U.S. 336 (1922).

Of note is the following admonition contained in *Burns* v. *Wilson,* 346 U.S. 137, 140, 97 L.Ed. 1511, 1513, (1953):

> "Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforces it; and the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil

courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress."

While there are many cases sustaining the military's pretrial confinement procedure by implication, e.g., *United States ex rel. Chaparro* v. *Resor*, 412 F. 2d 433 (4th Cir. 1969)[1], there are no cases directly sustaining or invalidating the procedure under the Eighth Amendment. However, there is an analogue in the recent Ninth Circuit decision of *Daigle* v. *Warner*, _____ F.2d _____ (9th Cir., decided Oct. 24, 1973), *rev'q.* 348 F.Supp. 1074 (D.Haw 1972).

In *Daigle*, the issue was "whether the Sixth Amendment's guarantee of counsel in criminal prosecutions, as interpreted and applied in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), is applicable to trials before summary courts-martial." The Ninth Circuit rejected the "broad view of the applicability of the provisions of the Bill of Rights to members of the military service" which is reflected in many of the cases cited by plaintiff in the instant case and held that the scope of the Sixth Amendment is limited to the extent that the right to counsel was applicable at the time of the Amendment's adoption. Since at that time there was a very limited right at a court-martial to have the assistance of counsel, the Court held that the Amendment was never intended to guarantee counsel for members of the military to the extent required by *Argersinger* for civilian courts.

A similar analysis is applicable to the instant case. Despite plaintiff's argument based on the "canons of statutory construction", the Eighth Amendment, like the Sixth was intended only to secure rights which had theretofore existed and the rights of a serviceman never included any provision for bail. See also, Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958), which was relied upon extensively in *Daigle*.

Finally, even assuming that the Eighth Amendment is applicable to military personnel, it does not create a constitutional right to bail. Instead it only provides that "[e]xcessive bail shall not be required." As the Supreme Court stated in *Carlson* v. *Landon*, 342 U.S. 524 at 525:

> "In England [the bail clause] has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail . . . . The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country."

Any "right" to bail which exists therefore is a statutory and not a constitutional right. Congress has repeatedly and deliberately refused to create such a right for military personnel. Until it does, no such "right" will exist.

---

[1] In *Chenoweth v. Warner*, _____ F. 2nd_____ (decided April 11, 1973) the Ninth Circuit adopted the approach of sustaining the procedure without ruling on its constitutionality (over District Judge King's dissent) much like the Fourth Circuit in Chaparro; but that decision was vacated by the Supreme Court and remanded with a suggestion of mootness.

Criminal Law Items

From: Criminal Law Division, OTJAG

1. Ordering the New Article 15 Forms. Due to the recent publication of a revised DA Form 2627, Record of Proceedings Under Article 15, UCMJ (1 November 1973), the number of those forms required by each command will be significantly reduced. The new form is a manifold form with interleaved carbons; therefore, orders for the new form should not be based upon need for the preparation of carbon copies, as required copies are included in the form itself.

2. Disqualification of Convening Authority. In *United States v. Sierra-Albino*, 23 U.S.C.M.A. 63, 48 C.M.R. 534 (No. 27, 671, 26

April 1974), the United States Court of Military Appeals expanded upon its ruling in *United States v. Dickerson*, 22 U.S.C.M.A. 489, 47 C.M.R. 790 (1973), with regard to the disqualification of the convening authority to act on an accused's case when a subordinate of the convening authority has entered into an agreement with a witness against the accused.

In *Sierra-Albino*, the special court-martial convening authority entered into a pretrial agreement with a witness against the accused in return for his testimony at the accused's general court-martial. The witness testified against the accused and he was convicted. The general court-martial convening authority was not made aware of the special court-martial convening authority's dealings until he received a petition for clemency from the accused prior to taking his action in the case.

The Court stated:

> [T]he time when the convening authority learns that his subordinate has officially placed his imprimatur on the witness' credibility is not a crucial factor. Whenever a convening authority learns a subordinate has vouched for the credibility of a witness by extending immunity, it is still asking too much of the convening authority to free himself wholly of the influence of his subordinate's judgment in his own review and action upon the case.

In view of the Court's decision, staff judge advocates must insure that such dealings by subordinate commanders are not present in cases they are forwarding to their convening authority for action.

3. Admissibility of Sanity Board Reports. Some confusion has been generated as a result of the United States Army Court of Military Review's opinion in *United States v. Smith*, 47 CMR 952 (ACMR 1973). In *Smith*, the Court set aside the findings of guilty and the sentence because the military judge permitted a Government psychiatric witness to testify, over defense objection, to the "unanimous" opinion of the members of a sanity board. During the course of the trial, Dr. Duboczy, the senior member of a duly appointed sanity board, testified as to the collective and unanimous opinion of the board. However, neither of the other two board members were present for cross-examination as to the basis for their opinions. The trial counsel commented on Dr. Duboczy's testimony concerning the opinions of the absent board members during his closing argument.

The Court concluded that the evidence regarding the accused's mental responsibility was in delicate balance, and that the above mentioned testimony was inadmissible hearsay under paragraphs 122*c* and 144*d*, *Manual for Courts-Martial, United States, 1969 (Revised edition)*. In this connection, it is important to note that paragraphs 122*c* and 144*d* of the *Manual* preserve the common law dichotomy of fact *vis-à-vis* opinion generally applicable to the official records and business entry exceptions to the hearsay rule. While so much of the report of a sanity board as pertains to entries of facts or events is admissible under either the official records or business entry exception, those portions which constitute an opinion are not similarly admissible. See *United States v. Murph*, 13 USCMA 629, 33 CMR 161 (1963); *United States v. Thomas*, 13 USCMA 163, 32 CMR 163 (1962); *United States v. Roland*, 9 USCMA 401, 26 CMR 181 (1958); *United States v. Parmes*, 42 CMR 1010 (AFCMR 1970). It follows, therefore, that the objectionable portions of the sanity board's report relating to opinion may not be admitted into evidence through the testimony of one medical witness. The opinions of each examining psychiatrist may be admitted, however, by stipulation or through each psychiatrist's own testimony, thus insuring the accused's right to cross-examine witnesses against him.

4. Assisting Civilian Defense Counsel. A recent case decided by the United States Court of Military Appeals, *United States v. Maness*, 23 U.S.C.M.A. 41, 48 C.M.R. 512 (No. 27,444, 19 April 1974), demonstrates the adverse consequences that can flow from an easily avoidable situation. In *Maness*, there was was a breakdown in communication between the military

defense counsel, the civilian defense counsel, and the Article 32 investigating officer. This breakdown in communication resulted in the Article 32 investigation of the accused's case being conducted in the absence of his civilian counsel. The court determined that this was prejudicial error, and set aside the findings of guilty and the sentence.

Unless relieved of his responsibility by the accused, the military defense counsel has a duty to assist the civilian counsel in the preparation of the defense. Included therein is the requirement to insure that the civilian counsel is kept aware of developments and the scheduled dates of proceedings.

Claims Items

From: U.S. Army Claims Service

1. **Household Goods Recoveries.** Since a significant increase has been noted in claims settled under the Military Personnel and Civilian Employees Claims Act (31 U.S.C. 240-243) as implemented by Chapter 11, AR 27–20, it is important to review the success of recovery actions from third parties which makes a significant contribution to the overall claims program. Listed below are the offices with the ten highest recovery statistics for each category listed. The computations were made by totaling the household goods and hold baggage payments for the period running from October 1973 to February 1974. This sum was divided into the total recoveries for the period, thus producing percentage recoveries of the amounts paid.

a. Area Claims Authorities

Name	*Percent*
Fort Polk, LA	35.86
Fort Campbell, KY	32.11
Fort Devins, MA	31.38
U.S. Support Command, Hawaii (Provisional)	29.28
Fort Leonard Wood, MO	28.19
U.S. Military Academy, NY	26.99
Redstone Arsenal, AL	26.05
Fort Stewart, GA	25.33
Fort Lewis, WA	25.30

b. CONUS Other Than Area Claims Authorities

Name	*Percent*
HQ, Arlington Hall Sta., MDW	96.35
HQ, U.S. Army Tank & Automotive Command	50.40
HQ, Madigan General Hospital Tacoma, WA	45.34
Fort Monroe, VA	41.41
HQ, Letterman General Hospital Presidio of San Francisco, CA	33.56
HQ, U.S. Army Pine Bluff Arsenal Pine Bluff, AR	31.20
Fort Detrick, MD	29.68
HQ, Desert Test Center Dugway, UT	28.10
HQ, Fort Greeley, AK	25.88
HQ, Western Area MTMTS Oakland, CA	24.03

c. Overseas Commands

Name	*Percent*
HQ, 7th Corps Munich Branch	32.03
HQ, U.S. Army STRATCOMEUR	21.24
HQ, NATO/SHAPE Support Group (U.S.)	19.34
HQ, 1st Armored Div. Ansbach Branch	19.20
HQ, U.S. Army Southern European Task Force	16.94
HQ, 3d Armored Div.	16.38
U.S. Army Claims Office, Belgium	15.70
HQ, U.S. Army Japan	11.38
HQ, U.S. Army Japan (USARBCO)	10.22
HQ, 1st Armored Div.	10.06

Each claims approving and settlement authority should strive to reserve the maximum amount possible, as these funds are reused in settlement of claims. Your renewed efforts are

sought to accompoish maximum recovery. Similar listings, as above, will be published periodically.

2. Lists of Firms to Supply Estimates. This Service has received information that some claims offices are still not supplying claimants with lists of reliable firms who can supply repair estimates and estimates for replacement costs of damaged household goods items. This procedure was recommended for adoption in the standing operating procedure of each claims office together with appropriate emphasis on agreed cost of repairs and the small claims procedure. These factors were previously discussed as a claims item in the January 1973 edition of *The Army Lawyer*. In order to insure that claims offices have adopted these procedures, the availability of a list of firms has been made an item to be checked in future visits to claims offices. In addition, this will probably be an item of concern in future IG Inspections.

3. Use of Unit Claims Officers to Process Household Goods Claims. It has been reported that the use of unit claims officers to process household goods claims usually creates an additional delay to the timely filing of such a claim. Although the use of unit claims officers may be of some assistance in remote areas, the rapid turnover of officers in these assignments usually negates any advantages achieved by the procedure. Claims officers should, therefore, not require claimants to process their household goods claims through unit claims officers unless direct processing is not feasible due to the remoteness of the area. If a unit claims officer is utilized under these circumstances, his workload should be closely monitored by the claims officer to insure timely processing of each claim.

4. Computation of Processing Times. Paragraph 14–3*a*(1) of AR 27–20 provides in part that immediately upon receipt of a claim against the U.S. by a settlement or approving authority, a permanent claim file number will be assigned and Part I of the DA Form 3 will be completed. Under these provisions, claims officers do not have discretion to refuse to accept a claim for damage to personal property until the claimant has supplied all documentation. The claim becomes a matter of record upon receipt from the claimant and elapsed time for processing must be computed from the date of first receipt.

5. Property Disposal. Paragraph 11–15*b* of AR 27–20 requires in part that the claimant receive a receipt for property which is turned into PDO as not repairable and submit the receipt to the approving authority for inclusion in the file of the paid claim. In some instances claims officers are not reviewing files to insure compliance with this requirement prior to closing the file and forwarding the file for storage. It is important that claimants be impressed with their obligation to turn in items for which they have been paid in full and to insure that the file properly reflects this fact prior to closing the file. The members of the Post Settlement Review at this Service will take special note to check compliance with this requirement when they review claims files forwarded from the field.

6. Inspection of Damaged Personal Property. When, by the nature and/or quantity of the damaged items, a question is raised concerning the appropriateness of the claim it is suggested that the claims officer or his representative make a personal inspection of the damaged items in addition to the one performed by the inspector from the transportation office.

In addition the transportation inspectors should be encouraged to state the probable cause of the damages if feasible and to include the container conditions when possible.

7. Awards in Excess of $2,500 Under F.T.C.A. References: (a) 28 U.S.C. §2672; (b) 28 C.F.R. 14.10; (c) Paragraphs 2–26B and 4–11b, AR 27–20. Awards in excess of $2,500 under the Federal Tort Claims Act are not payable from the Department of Defense Claims Appropriation but are paid by the General Accounting Office from funds available for payment of judgments.

Claims approving authorities will insure compliance with the above references.

8. Public Law 93–253. The Federal Tort Claims Act has been amended by Public Law 93–253, 16 March 1974. The purpose of the amendment is to further limit the sovereign immunity of the United States thus enabling one whose person or property has been injured as a result of the illegal actions of federal law enforcement officials to file a claim with the appropriate federal agency. Section 2 of Public Law 93–253 states as follows:

"Section 2680(h) of title 28, United States Code, is amended by striking out the period at the end thereof and inserting in lieu thereof a colon and the following: 'Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.' "

This amendment would appear to require certain changes in implementing regulations. Paragraphs 3–5g, 4–8h and i, 6–5g, and 10–11z, AR 27–20, may require revision. Claims regulations are being reviewed in light of the possible ramifications of Public Law 93–253. Pending changes to AR 27–20, all claims which would appear to be affected by the Congressional policy expressed in Public Law 93–253 will, following investigation, be forwarded to the Chief, U.S. Army Claims Service for consideration and disposition.

TJAGSA—Schedule of Resident Continuing Legal Education Courses Through 30 August 1975

Number	*Title*	*Dates*	*Length*
5F–F4	11th The Law of War & Civil-Military Operations	22 Jul-2 Aug 74	2 wks
5F–F11	59th Procurement Attorneys	29 Jul-9 Aug 74	2 wks
5F–F1	16th Military Justice	29 Jul-9 Aug 74	2 wks
5F–F1	Administration Phase	29 Jul-2 Aug 74	1 wk
5F–F1	Trial Advocacy	5 Aug-9 Aug 74	1 wk
5F–F5	14th Civil Law I	5 Aug-16 Aug 74	2 wks
5F–F5	Law of Military Installations	5 Aug-9 Aug 74	1 wk
5F–F5	Claims	12 Aug-16 Aug 74	1 wk
512–71D20/40	4th Civil Law Paraprofessional	23 Sep-27 Sep 74	1 wk
512–71D20/40	3d Criminal Law Paraprofessional	23 Sep-27 Sep 74	1 wk
5F–F16	2d Legal Assistance	30 Sep-3 Oct 74	3½ days
CONF	The Judge Advocate General's Conference	6 Oct-10 Oct 74	5 days
5F–F7	2d Reserve Senior Officer Legal Orientation	15 Oct-18 Oct 74	3½ days
5F–F8	17th Senior Officer Legal Orientation	4 Nov-7 Nov 74	3½ days
5F–F11	60th Procurement Attorneys	11 Nov-22 Nov 74	2 wks
CONF	U.S. Army Reserve Judge Advocate Conference	4 Dec-6 Dec 74	3 days
5F–F10	11th Law of Federal Employment	9 Dec-12 Dec 74	3½ days
5F–F12	5th Procurement Attorney, Advanced	6 Jan-17 Jan 75	2 wks
5F–F17	1st Military Administrative Law and the Federal Courts	13 Jan-16 Jan 75	3½ days
5F–F8	18th Senior Officer Legal Orientation	27 Jan-30 Jan 75	3½ days
7A–713A	5th Law Office Management	3 Feb-7 Feb 75	1 wk
5F–F15	2d Management for Military Lawyers	10 Feb-14 Feb 75	1 wk
5F–F8	*19th Senior Officer Legal Orientation	24 Feb-27 Feb 75	4 days
CONF	National Guard Judge Advocate Conference	2 Mar-5 Mar 75	4 days
5F–F11	61st Procurement Attorneys	24 Mar-4 Apr 75	2 wks
5F–F13	2d Environmental Law	7 Apr-10 Apr 75	3½ days

Number	*Title*	*Dates*	*Length*
5F-F8	20th Senior Officer Legal Orientation	14 Apr-17 Apr 75	3½ days
(None)	3d NCO Advanced	28 Apr-9 May 75	2 wks
5F-F6	5th Staff Judge Advocate Orientation	5 May-9 May 75	1 wk
5-27-C8	22d JA New Developments Course (Reserve Component)	12 May-23 May 75	2 wks
5F-F1	17th Military Justice	16 Jun-27 Jun 75	2 wks
5F-F1	Administration Phase	16 Jun-20 Jun 75	1 wk
5F-F1	Trial Advocacy Phase	23 Jun-27 Jun 75	1 wk
5F-F8	21st Senior Officer Legal Orientation	30 Jun-3 Jul 75	3½ days
5F-F9	14th Military Judge	14 Jul-1 Aug 75	3 wks
5F-F3	19th International Law	21 Jul-1 Aug 75	2 wks
5F-F11	62d Procurement Attorneys	28 Jul-8 Aug 75	2 wks

*Army War College only

DAC Attorneys Eligible To Attend Advanced Class at TJAGSA

TJAGSA is pleased to announce that Department of the Army civilian attorneys may be selected to attend the 24th Advanced Course at The Judge Advocate General's School on the grounds of the University of Virginia in Charlottesville, Virginia. The course will run from August 1975 to May 1976. The minimum grade under consideration for selection will be GS-11. Candidates must have a minimum of four years government service and be at least five years away from eligibility for normal retirement. If the candidate's activity or command agrees, his position will be held open for him. The activity or command may fill the candidate's position on a temporary basis during his nine-month absense or detail another attorney to assume part of the candidate's workload.

The Advanced Course offers an excellent educational opportunity for career DA civilian attorneys. This course has received recognition from the American Bar Association as meeting its standards for graduate legal education. During the nine-month academic year, advanced class students receive instruction in the four major areas of military law, namely criminal law, civil law, procurement law, and international law. Students are given the opportunity to submit a thesis of graduate level quality which makes a substantial contribution to military legal scholarship. The core curriculum is supplemented by elective courses presented both by the University and TJAGSA. The course is further enriched by a wide range of well-qualified guest speakers and several field trips.

The nomination and selection process will be implemented in conjunction with DCSPER's Office of Civilian Personnel (Training and Manpower Management). At a later date, major commanders will be asked to nominate qualified civilian attorneys for selection for this program.

The Korean Military Justice System

The following is taken from a speech given at the Eighth U.S. Army Captains' Conference by Captain Lee, In Soo, of the Republic of Korea Army. Captain Lee attended the 54th TJAGSA Basic Course as an allied JAG officer.

I. Constitutional Provisions.

Before looking over the Military Penal Law and court-martial system of the Republic of Korea, it would be helpful to look at our Constitution. Several basic provisions of the ROK Constitution control criminal trials in civilian courts and courts-martial.

Under these provisions no person shall be arrested, detained, seized, searched, interrogated, punished or be subject to involuntary labors except as provided by law (Art. 10(1)). No citizen shall be tortured or compelled to testify against himself in criminal case (Art. 10(2)). In addition a

warrant issued by a judge upon request of the prosecutor must be presented in cases involving arrest, detention, search or seizure (Art. 10(3)). All persons who are arrested or detained shall have the right to the prompt assistance of counsel. After indictment if a criminal defendant cannot hire a lawyer, the State will assign a counsel to the defendant as provided by law (Art. 10(4)). No person shall be prosecuted unless his actions constitute a crime under the law, nor shall he be placed in double jeopardy (Art. 11(1)).

Citizens who are not on active service or civilians working for the military are not tried in courts-martial within the territory of the Republic of Korea, except in certain cases involving espionage relating to military affairs and crimes in regard to sentinels, sentry-posts, supplying harmful food, prisoners of war as defined by law, and when they are under an extraordinary state of martial law or when the President declares emergency measures pertaining to the courts (Art. 24(2), Art. 53). All citizens have the right to a speedy trial. The criminal defendant has the right to a public trial without delay in absence of justifiable reasons (Art. 24(3)). Trials and decisions of the courts are open to the public; however, trials may be closed to the public by the court when there is a possibility that such trials may disturb the public safety and order, or be harmful to the public decency (Art. 107).

Military tribunals may be established as special courts to exercise jurisdiction over military trials (Art. 108(1)). The Supreme Court shall have final jurisdiction over the military tribunals (Art. 108(2)). Military trials under an extraordinary state of martial law are limited to original jurisdiction only in cases involving military personnel and military civilians, espionage involving military affairs and crimes as defined by law relating to sentinels, sentry-posts, supplying harmful food and prisoners of war (Art. 108(3)).

II. Military Penal Law.

The following persons are subject to the Military Penal Law: (a) military personnel, (b) military civilians, (c) students, pupils and military cadets of various agencies belonging to the Armed Forces who are on the military list, (d) reserve military personnel on active duty, and (e) Koreans and foreigners alike who have committed a crime of espionage relating to military affairs, crime in regard to sentinels, sentry-posts, supplying harmful food and prisoners of war (Art. 1, Military Penal Law).

There are fifteen punitive chapters defining military crimes. The titles of these chapters are as follows:

Chapter I	Insurrection
Chapter II	Offense of Aiding the Enemy
Chapter III	Abuse of the Right of Command
Chapter IV	Surrender or Desertion by a Commanding Officer
Chapter V	Desertion of Guard Post
Chapter VI	Desertion of Military Service
Chapter VII	Dereliction of Military Duties
Chapter VIII	Insubordination
Chapter IX	Assault, Threat, Injury and Homicide
Chapter X	Contempt
Chapter XI	Offenses Related to Military Properties
Chapter XII	Violation of Order
Chapter XIII	Looting
Chapter XIV	Offenses Related to Prisoners of War
Chapter XV	Other Offenses

These punitive articles do not cover all offenses committed by persons subject to Military Penal Law. In the absence of special provisions in this law, the provisions of other criminal laws such as the Criminal Code, National Security Law and the Narcotic Law, etc. shall govern (Art. 4, Military Penal Law).

Under the doctrine of "without a law, there is no crime and no punishment", maximum and minimum punishments are set in all provisions of the punitive articles. For example, under Article 79, any person who without permission temporarily leaves his place of duty or does not reach his designated place of duty within the time designated shall be punished by imprisonment at hard labor or confinement for not more than one year. Punishments applicable to either civilian criminal courts or courts-martial

are classified as the death penalty, penal servitude, imprisonment, deprivation of civil rights, suspension of civil rights, fines and confiscation. Under this same theory, the Military Penal Law does not have provisions similar to Articles 133 and 134 of the UCMJ.

III. Jurisdiction of Courts-Martial.

Courts-martial have jurisdiction in regard to crimes committed by the following categories of persons: (a) persons subject to the Military Penal Law, (b) prisoners of war in custody of the national armed force, (c) persons in military prisons serving a sentence imposed by a court-martial or the Supreme Court (Art. 2, Courts-Martial Law, hereinafter all Articles referred to are from Courts-Martial Law). Courts-martial have jurisdiction over the crimes of any person described above in (a) and (b) even though committed before the person acquired the status described (Article 2(2)). If the court-martial is unable to exercise the right to conduct the trial due to a change in personal status, the case will be transferred to a civilian judicial police officer, a civilian prosecutor, or civilian court of the same level which has jurisdiction over the crime (Article 2(3)). Courts-martial can also have jurisdiction granted by Martial Law and Presidential Emergency Measures (Art. 3, Court-Martial Law, Art. 24(2) and 53 of Constitution).

IV. The Control Officer.

There shall be control officer for each court-martial, who is similar to the convening authority under the UCMJ. The control officer of the high court-martial shall be the Minister of National Defense or the Chief of Staff of each force. The control officer of a common court-martial shall be the commander-in-chief, commanding general, or the responsible commander of the unit and area in which the common court-martial is established (Art. 7). The control officer of high courts-martial has the power to control and manage the administrative affairs of the court-martial and shall direct and supervise the administrative affairs of all common court-martial under his jurisdiction. The control officer of the common court-martial shall control and manage the administrative affairs of the court-martial under his jurisdiction (Art. 8).

V. Investigation.

Crimes are investigated by Military Judicial Police Officers. The following persons investigate crimes as military judicial police officers: (a) officers, warrant officers and non-commissioned officers of the provost marshal's corps, (b) officers, warrant officers and non-commissioned officer's assigned to the security corps (Art. 43). A military judicial police officer, when he believes an offense has been committed, will investigate that offense (Art. 227(1)). In cases where it is necessary to investigate, the military judicial police officer can request the presence of the suspect and can request a statement. Before being required to give a statement, the suspect is notified in advance that he may refuse to speak (Art. 231). The statement of the suspect is written out. The statement is then shown to the suspect for inspection or read to him, and he is asked whether or not there are mistakes in the statement. Where there is a demand for amendment, deletion or change by the suspect, the change is recorded therein. If the suspect states that there is no mistake in the statement, the statement shall be signed and sealed by the suspect (Art. 235). In our law this statement is called a protocol.

If there is a reason to suspect that an offense has been committed by the suspect (Art. 237(1); 110), the military judicial police officer may arrest the suspect by obtaining a warrant of arrest issued by the control officer. This is done through the local military prosecutor by contacting the control officer (Art. 237(1)). The control officer will honor a request for issuances of a warrant of arrest from a military prosecutor if he considers it proper (Art. 237(3)). The control officer hears the opinion of a law officer when he issues a warrant of arrest or rejects the request (Art. 237(4)). When the military judicial police officer arrests a suspect, the suspect shall be released if he is not transferred to the military prosecutor within 10 days (Art. 238). The military police officer may request extension of the detention period only one time through the military prosecutor.

Such extension will be granted for not longer than 10 days if reasonable cause to continue the investigation is shown to the control officer by the military prosecutor (Art. 24 (1)).

The military judicial police officer may, if necessary for the investigation of an offense, search, seize or inspect evidence according to a warrant of search and seizure issued by the control officer, again obtained through the prosecutor (Art. 251(2)). The military judicial police officer may summon a person other than the suspect to gather statements of the facts and that person may also be asked to give expert opinion, interpret or translate (Art. 257). In cases where the military judicial police officer has conducted an investigation, he forwards the case to the military prosecutor, attaching any documents and real evidence thereto (Art. 277).

A prosecutor shall be appointed by the control officer from among the judge advocates (Art. 41), and his duties are: (a) investigation of crimes, (b) prosecuting at courts-martial and any acts necessary for maintaining the justice system, (c) direction of and supervision over the execution of the sentence rendered by a court-martial, etc. (Art. 37). The prosecutor who has received the case may continue the investigation. The period of detention and the method of investigation are the same as those of the military judicial police officer (Art. 227-257). When the prosecutor has completed the investigation of a case, he takes the following actions: (a) seeks an indictment, if warranted (b) or no indictment if an offender has not been arrested, or it is considered that the right of public indictment is not exercisable, or there is no suspicion of offense, or it is considered that it is not proper to indict (Art. 279). If an indictment is sought, a written indictment must be filed with the proper common courts-martial (Art. 289(1)).

VI. Trial Procedure.

A common court-martial is the court of first instance (Art. 11). In contrast to the UCMJ, there is only one kind of court-martial as the court of first instance. The common court-martial is established in the Headquarters of the Ministry of National Defense, the Headquarters of each armed force, and in all subordinate units, commanded by a general grade officer (Art. 6(2)).

When a common court-martial has been instituted, the accused and his defense counsel must be served with a copy of the indictment at least five days before the date of the first public trial (Art. 301). In addition, the law officer must, when an indictment occurs, without delay, notify the accused that he may select a defense counsel, and if he does not select a defense counsel, the court-martial will select a defense counsel for him (Art. 302).

Two or four court members and one law officer are appointed to the common court-martial (Art. 31). The court-martial is composed of the court members, a law officer, and the president of the court who is the senior officer among the members (Art. 29(3). The court members are non-lawyer officers, appointed by the control officer from among the officers having some knowledge of the law, noble character and the experience required to sit as a court member (Art. 22(1)). The law officer is appointed by the control officer from among the judge advocates (Art. 23(1)).

If there is no counsel for the accused, the court-martial appoints a counsel (Art. 62(1)). The defense counsel will be appointed from among attorneys at law, officers qualified to be attorneys at law or probational judge advocates. Where the common court-martial cannot appoint an attorney at law or a lawyer officer as a defense counsel, the defense counsel may be appointed from among the officers who are well versed in the law (Art. 62(2)). The defense counsel has ready access to the accused or a suspect under physical restraint. He may deliver or receive documents or any other items (Art. 63), and may inspect or copy documents or evidence after the courts-martial has been instituted (Art. 64).

Each session of the trial is conducted in the courtroom. The president of the court, court members and law officer of the court-martial

sit in the courtroom and the court is opened upon the presence of the prosecutor and defense counsel (Art. 315). Except in minor cases as provided by the law, the court does not open unless the accused is present before the court in session (Art. 318, 317).

The president of the court questions the accused to insure he is the right person to be tried (Art. 321). The prosecutor reads aloud the written indictment at the beginning of the trial (Art. 322). The law officer then notifies the accused that he has the right to remain silent, to answer only certain questions, or all questions. He must allow the accused or his defense counsel an opportunity to state facts favorable to the accused (Art. 323).

The prosecutor and the defense counsel may in turn, make a direct inquiry into the particulars concerning the charge and the surrounding circumstances. The court may make an inquiry after the prosecutor and defense counsel have done so (Art. 324). The order of examination of the accused and witnesses is usually conducted by direct examination, cross-examination, redirect examination, recross-examination, and then examination by the court. Examination of evidence shall be conducted after the inquiries against the accused are over. However, if necessary, it may be conducted while such inquiries are being conducted (Art. 326). As to the examination of evidence, evidence submitted by the accused or his defense counsel is examined after the examination of evidence submitted by the prosecutor (Art. 336(1)). The court may conduct an examination of evidence and witnesses which it considers necessary after all evidence has been submitted by the parties (Art. 336(2)). Here, the order of examining of each witness is the same as that of examining the accused (Art. 202).

Under the principle of trial by evidence, facts are determined on the basis of the evidence (Art. 350). Confessions of an accused extracted by torture, violence, threat, after prolonged arrest, detention, deception and other means, or which are suspected to have been made involuntarily, shall not be admitted as evidence of guilt (Art. 352). When the confession of the accused is the only evidence against him, the confession cannot be taken as evidence of guilt (Art. 353). The rule of hearsay and its exceptions apply as rules of evidence (Art. 354, 360), but documents and statements which the prosecutor and the accused have consented to adopt as evidence may be admitted as evidence if they are admitted to be genuine (Art. 362(1)).

The probative force of evidence is left to the discretion of the court (Art. 351). In weighing the evidence, the court member is expected to utilize his common sense and his knowledge of human nature and of the ways of the world. In order to convict of an offense, the court member must be satisfied beyond a reasonable doubt that the accused is guilty. The burden of proof in criminal proceedings is on the prosecution and so when there is equal weight of the evidence, the benefit of doubt should be given to the accused, and the verdict must be not guilty (the presumption of innocence). The prosecutor states his opinion concerning facts and application of law after the testimony of all witnesses and the examination of the evidence has been finished. The accused and his defense counsel then state their opinions and are given an opportunity to make a final plea (Art. 345). Judgment is determined by deliberation of the members and the law officer of the court. It is based on the majority opinion (Art. 68, 69). The law officer prepares a written judgment and the pronouncement or notification of that judgment is made in open court (Art. 72, 76). The control officer confirms the judgment, or if there exist any grounds by which the penalty pronounced is considered improper, he may mitigate or remit execution of punishment but not the findings (Art. 369).

VII. Appeals.

The prosecutor or the accused may appeal against the judgment rendered by the common courts-martial to the high courts-martial, on the grounds of a violation of law, mistake of fact or unreasonableness of the punishment (Art. 385(1), 404). If no appeal is made, the decision of the common court-martial becomes legally effective after the period for appeal has expired.

The high court-martial is established in the Headquarters of the Ministry of National Defense and each armed force (Art. 6(1)). Two court members and three law officers are appointed to the high courts-martial (Art. 32(1)). For a trial of high court-martial, no person other than an attorney at law or an officer who is possessed of the qualifications for attorney can be appointed as a defense counsel (Art. 413(1)). The prosecutor and the defense counsel argue on the basis of briefs submitted to the court stating the reasons for the appeal (Art. 415).

Where there exists no ground for appeal, the appeal is dismissed by means of a judgment. Where it is obvious that there exists no grounds for appeal, the court may dismiss an appeal, without conducting oral procedings by examining the petition for appeal, the briefs of counsel or any other records of the proceedings (Art. 420). The original judgment shall be quashed and a new judgment announced when the court decides that any of the grounds for appeal are valid (Art. 425). When the original judgment is to be quashed on the ground that there were no grounds for indictment or lack of jurisdiction, the case is sent back to the original court-martial (Art. 423). The control officer must confirm the judgment of the high courts-martial (Art. 431, 369).

An appeal may be lodged against a judgment rendered by a high court-martial to the Supreme Court on the grounds of violation of law (Art. 432). If no appeal is made, the decision of the high court-martial becomes legally effective after the period for appeal has expired. The Supreme Court can take action with respect to matters of law (Art. 432). The Supreme Court may render a judgment, without the oral proceedings, on the basis of a petition of appeal, the briefs of counsel and any other records of proceedings (Art. 436). Where it is apparent that there exists no ground for the appeal, the appeal may be dismissed without oral proceedings by means of a judgment (Art. 437). Where there exists grounds for appeal, the original judgment is quashed and the case is transferred to the competent court having the jurisdiction over it or sent back to the courts-martial by means of a judgment (Art. 439).

The judgments of the Supreme Court or of the courts-martial (when no appeal is made) are considered final and are not subject to further appeal. But there are two kinds of exceptions: in cases where there exist reasons of mistake of fact, the reopening of the case may be requested for the benefit of a person against whom a judgment of guilty has become finally binding (Art. 460); or when it has been discovered after a judgment of the courts-martial or of the Supreme Court has become final that the trial of the case was in violation of law, the Prosecutor-General may lodge an extraordinary appeal in the Supreme Court (Art. 483).

Personnel Section

1. Law Day Revisited. As Wednesday, 1 May 1974, drew to a close, it was to become apparent to the Army community that the members of the Judge Advocate General's Corps had added another year to their fine tradition of outstanding Law Day Observances. Following the American Bar Association's theme of *Young America Lead The Way*, judge advocates sponsored and coordinated Law Day observances at 60 installations in 23 states, the District of Columbia and eight foreign countries.

Pursuant to the request for judge advocate offices to submit after action reports, which appeared in *The Army Lawyer*, March 1974, and a letter to all Law Day Chairmen, JAGS/D, 8 April 1974, 62 such reports were received by TJAGSA. From these reports and their supporting inclosures, a wealth of documentation was presented on the successes of JAGC efforts in the observances of Law Day 1974. A consolidated after action report was prepared from those reports received by TJAGSA, which included a JAGC entry to the 1974 ABA Award of Merit Competition, and was submitted to The Judge Advocate General. Upon reading the report MG Prugh expressed his de-

sire that *The Army Lawyer* publish a note of deep thanks and appreciation to judge advocates for their representation of the Corps and the legal profession in such an honorable fashion.

So members of the Judge Advocate General's Corps, especially 1974 Law Day Chairmen, congratulations on a job well done!

2. Officer Record Brief. All officers are again reminded of the importance of the Officer Record Brief (ORB). This automatic data processing "machine produced" document replaced the DA Form 66 previously maintained by PP&TO. The DA Form 66 is still maintained by your Personnel Officer. Information concerning you (e.g., promotions, awards and MOS) is entered on your DA Form 66 by your Personnel Officer and he submits the information to MILPERCEN for inclusion on the officer master record tape. ORBs are produced from information contained on this tape. In addition to data submitted by your Personnel Officer, information can also be entered on the tape as a result of the annual audit of your ORB. Many officers are neglecting to conduct this audit. This is very important! See your Personnel Officer regarding audits conducted in your month of birth. *PP&TO cannot change your ORB!*

It is acknowledged that many officers have encountered difficulties in affecting changes to ORBs. The best advice is to keep trying. In addition, it is YOUR responsibility to see that items such as academic achievements earned in off-duty study, civic commendations and similar accolades are placed in your file. Send two copies of PP&TO. One is filed in your "branch" file in PP&TO. The other is forwarded to MILPERCEN for inclusion in your "official military personnel file." This file is often erroneously referred to as the "TAG 201 file."

3. Officer Academic and Evaluation Reports. It is anticipated that regulatory changes will soon be published to establish new procedures for rendering academic and evaluation reports on officers in the Excess Leave Program and the newly established Funded Legal Education Program.

AR 623–1 will be changed to provide that these officers will not receive academic evaluation reports for their law school studies. Instead, they will be required to forward copies of law school transcripts and evidence of degree conferred to DAJA–PT and also present them to local personnel officers for entry in personnel records. Officers obtaining advanced degrees under the Civil School Program will continue to receive academic evaluation reports as prescribed in AR 623–1.

AR 623–105 will be changed to provide that officers in the Excess Leave and Funded Legal Education Programs receive evaluation reports after completing a period of on-the-job training (OJT) in excess of 30 days during school summer vacation periods. Student officers should receive at least one report per year. The regulation will also require that "boiler plate" descriptions of the programs are entered on the report form.

It is emphasized that these changes are expected but have not yet been made. These changes were prompted because files of officers who have participated in the Excess Leave Program often do not contain efficiency/evaluation reports for OJT periods. All personnel—student-officers, raters and indorsers—should insure that OERs are rendered when required. Reports on student-officers should be prepared in a manner that will permit selection boards to understand what the officer has been doing. In the absence of carefully prepared OERs, it is difficult to ascertain meaningful information from the file of an officer attending law school.

Finally, it should be clear on OERs of student officers in the two programs under discussion that regardless of their "Basic" branch, their "Control" branch is JA.

4. Excess Leave Officers—Officer Evaluation Reports. Part 1, item *e* DA Form 67–7, should reflect an excess leave officer's basic branch in the "Basic" block and "JA" in the "Control" Block. Excess leave officers are *detailed* to JAGC while they are pursuing the study of law. Failure to reflect JA as the con-

trol branch on OER's results in the branch copy of the OER being filed in the officer's basic branch file rather than the PP&TO branch file.

5. Funded Legal Education and Excess Leave Programs—Officer Evaluation and Academic Evaluation Reports. It is anticipated that AR 623–105 and AR 623–1 will be amended to provide that Funded Legal Education and Excess Leave Program officers will receive one academic evaluation report (DA Form 1059–1) for the entire period of law school attendance and one evaluation report (DA Form 67–7) each year covering the period 1 October through 30 September. The OER will reflect the number of OJT rated duty days. Watch for these important changes.

6. Official Military Personnel Files—Photographs. All personnel are again encouraged to have photographs taken, as required by AR 640–30, for inclusion in their official military personnel (MILPERCEN) file and branch (PP&TO) file. Recent reviews of these files reveal that many officers have failed to have their photographs taken. Arrangements should be made through your personnel officer to have a photograph made. Review your photograph after it is taken to insure that it is a good one.

7. ABA Meeting. Judge advocates who are planning to attend the 1974 ABA Annual Meeting in Honolulu, August 12-16, should make note of the following activities of interest to the lawyer in uniform. On Monday, August 12, the Judge Advocates Association will hold its annual meeting at 3:00 P.M. Later that evening, the association will hold its annual dinner at the Cannon Club on the slopes of Diamond Head at 8:00 P.M. featuring Admiral Noel A.M. Gayler, U.S.N., Commander-in-chief, Pacific, as guest speaker. A reception will precede the dinner at 7:00 P.M. Tuesday, August 13, will be highlighted by "Ethics and the Government Lawyer," a panel co-sponsored by the Military Service Lawyer Committee and the Young Lawyers in Public Service Committee. Colonel John Jay Douglass, Dean of the National College of District Attorneys and former TJAGSA Commandant, will be among the panel members. The annual Military Lawyer Luncheon will be held at the Cannon Club on Thursday, August 15. ABA President Chesterfield Smith has scheduled a grand finale for the meeting Friday night, August 16, at Fort DeRussy, the Army's recreation area on Waikiki Beach, for all ABA registrants.

8. Letter of Commendation. The following letter was received by The Judge Advocate General for forwarding to a Judge Advocate defense counsel. This is another acknowledgment of the fine work done by the members of the firm.

"The purpose of this communication to you as the appointed defense counsel for referenced officer is to express the collective appreciation of the family, friends, and colleagues of the undersigned for the highly developed legal skill and thoroughly prepared manner of presentation demonstrated by you in the successful defense of . . . [my son]. Morever, it should be acknowledged that responsible officers approved . . . [my son's] request that you be assigned to serve as the attorney for the defense in the case referenced above.

"Particularly noteworthy and personally observed by the undersigned [were] . . . specific conditions which presented unusual legal problems and obstacles to be considered, dealt with and overcome by you. . . . [They] were all treated skillfully and with a commendable degree of poise, professional integrity and sound judgment. Your well conceived basic plan for the case and attention to detail as attorney for the defense of . . . [my son] provided an example for others to emulate, all attesting to your well grounded basic legal education, experience, and dedication as a superbly competent legal officer of the United States Army.

"Therefore, I personally wish to commend you officially for the splendid performance of duty as defense counsel for my son, ... Further, I recommend this communication be made a part of your official record and file as an officer of The Staff Judge Advocate Corp of the United States Army."

Major General Prugh's personal letter of transmittal of the defense counsel read:

"1. It is with great pleasure that I forward to you the inclosed letter from . . . commending you for your splendid performance as defense counsel for his son, ... I take personal pride in the highly professional manner in which you have obviously performed. The outstanding performance of defense attorneys, such as yourself, insures that the Army's system of military justice functions in accordance with the highest standards of the legal profession, and serves to remind the public of that fact.

"2. Copies of this correspondence will be included in your Official Military Personnel File.

GEORGE S. PRUGH
Major General, USA
The Judge Advocate General"

9. Army Reorganization Ballistic Missile Management Structure. The Secretary of the Army has recently announced the reorganization of the ballistic missile defense (BMD) management structure in the context of the ABM Treaty. With deployment limited to one site at Grand Forks, North Dakota, the US BMD program is now focused on a vigorous research and development effort aimed at maintaining US technological superiority in this field and supporting the conduct of continuing SAL talks with the Soviet Union. Highlights of the reorganization plan include the consolidation of overall direction of all Army BMD activities under a BMD Program Manager who will report directly to the Chief of Staff of the Army, the consolidation of BMD field operations in two subordinate commands (i.e., BMDATC and BMDSCOM) under the BMD Program Manager, and the transfer of responsibility for supervision of the Kwajalein Missile Range from CRD to the BMD Program Manager.

Effective 20 May 74, the following name changes in BMD activities will take place:

OLD

USA Safeguard System Office
USA Safeguard System Command
USA Advanced Ballistic Missile Defense Agency
Safeguard System Site Activation Command
USA Safeguard System Command, Kwajalein Missile Range

NEW

Ballistic Missile Defense Program Office
Ballistic Missile Defense Systems Command
Ballistic Missile Defense Advanced Technology Center
Same
Ballistic Missile Defense Systems Command, Kwajalein Missile Range

The BMD Program Office will remain in Rosslyn, Virginia. The two subordinate commands will be located in Huntsville, Alabama. Information contained on page 13 of the 1973 JAGC Personnel Directory should be deleted, and the following substituted therefor.

BALLISTIC MISSILE DEFENSE ORGANIZATION

Ballistic Missile Defense Program Office (SC-W2ZA-AA), Commonwealth Bldg., 1300 Wilson Blvd., Arlington, VA 22209
Ext. 44047

FUGH, John L.	LTC	RA	Jun 73
BESOZZI, Paul C.	CPT	RA	Oct 72

Ballistic Missile Defense Systems Command (SC-W2Y5-AA), P.O. Box 1500, Huntsville, AL 35807
Autovon 742-4520/4680/3568

BROWN, Henry L.	COL	RA	Jul 72
NUTT, Robert M.	MAJ	RA	Jun 73
BRYANT, Edward G.	CPT	OBV-Indef	Apr 73
BEUMER, Joseph H.	GS-14		

HAMILTON, Robert R.	GS-14	
MORAN, Ernest A.	GS-14	
PATTERSON, Lawrence W.	GS-14	
THAYER, Ralph J.	GS-14	
CADY, John G.	GS-13	

Safeguard System Site Activation Command (SC-W26X-AA), Nekoma, ND 58355
Autovon 871-7350/7424

CURRIE, Stephen L.	CPT	OBV-Indef	Sep 72

Ballistic Missile Defense Systems Command (SC-W283-AA), Kwajalein Missile Range, APO SF 96555
Autovon 629-1655/1656

MANNING, Jay P.	CPT	RA	Dec 71

Current Materials of Interest

Articles.

Margolis, "Prosecutorial Cross-Examination: Limitations Upon the Sword of Justice," 65 J. CRIM. L. & C. 2 (March 1974). An Assistant United States Attorney examines the permissible methods for prosecutor to accomplish various tactical goals through cross-examination.

Rogge, "An Overview of Administrative Due Process," 19 VILL. L. REV. 197 (December 1973). The second half of a two-part study previously noted in the March 1974 issue of *The Army Lawyer.*

Mohr and Willett, "Constitutional and Procedural Aspects of Employee Access to the Federal Courts: Promotion and Termination," 8 VAL. U.L. REV. 303 (Winter 1974).

Kornblum, "The Expert as Witness and Consultant," 20 PRAC. LAW 13 (March 1974).

Joelson and Fleischaker, "The Water Pollution Control Act," 20 PRAC. LAW 29 (February 1974).

Note, "Proposal for a Uniform Radar Speed Detection Act," 7 U. MICH. J.L. REFORM 440 (Winter 1974).

Comment, "Polygraphic Evidence: The Case for Admissibility Upon Stipulation of the Parties," 9 TULSA L.J. 250 (Fall 1973).

Comment, "Elevation of Entrapment to a Constitutional Defense," 7 U. MICH. J.L. REFORM 361 (Winter 1974).

Note, "Evidence: The Admissibility of Videotape Depositions," 27 OKLA. L. REV 65 (Winter 1972).

Book Review.

Justice in the Military (Homer E. Moyer, Jr.) reviewed by Colonel John J. Douglass, (JAGC, Retired). 62 GEO. L.J. 1061 (February 1974).

By Order of the Secretary of the Army:

CREIGHTON W. ABRAMS
General, United States Army
Chief of Staff

Official:

VERNE L. BOWERS
Major General, United States Army
The Adjutant General